

Attorney Disciplined for Requiring Non-Refundable Engagement Fee

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On February 11, 2011, the Indiana Supreme Court issued an opinion disciplining a family law attorney for having her clients pay a non-refundable engagement fee as part of the contract of employment in *In re O'Farrell*, Case No. 29S00-0902-DI-76. This fee was "deemed earned upon commencement of Attorney's work on the case" and served as the basis for a public reprimand.

The attorney in this case apparently used a standardized non-refundable engagement fee provision in her family law contracts. Both of the contracts described by the Court stated that the non-refundable fee assigned to that case "shall be deemed earned upon commencement of Attorney's work on the case." The attorney argued that this fee is paid by a client to induce her firm to take a case and thus is earned on receipt. The Court held that it is improper to include this kind of a fee in most cases.

A contract provision for a nonrefundable general retainer, with or without a recitation of supporting circumstances, cannot be inserted as boilerplate language in all of a firm's fee agreements. Routine inclusion of such a provision in all fee agreements regardless of the circumstances would be misleading; and regardless of what the contract says, the basis for charging a nonrefundable general retainer in a particular case must be supported by the actual circumstances of that case.

Special circumstances that would not justify a non-refundable fee did not include "representing these clients precluded the Law Firm from representing the opposing parties and required time that the firm otherwise could have devoted to other representations," because this "would be true any time an attorney is engaged by a client." The Court noted that if an attorney is including a non-refundable fee provision as part of the representation agreement, "a lawyer would be well advised to explicitly include the basis for such non-refundability in the attorney-client agreement."

The Court noted that a flat fee agreement could be non-refundable "except for failure to perform the agreed legal services" and indicated that attorneys should advise their clients of this exception. The contracts in this case did not so advise.

However, rather than advise clients of this exception, the Law Firm's Flat Fee Contracts told clients that the fee was nonrefundable "even if the Client-Attorney relationship terminates prior to the completion of Attorneys' representation." The presence of this contract provision, even if unenforceable, could chill the right of a client to terminate Respondent's services, believing the Law Firm would be entitled to keep the entire flat fee regardless of how much or how little work was done and the client would have to pay another attorney to finish the task.

Finally, the Court offered guidance on how to avoid the problems it highlights here, while still addressing the concern that a client may demand a refund of a fee as unearned, even though the attorney has begun to open the case.

The Court is mindful of the legitimate concern of attorneys that they will go through the initial steps of opening a case and beginning work for a new client, only to have that client discharge them and demand a refund of the entire initial payment as unearned. The solution, however, is not allowing attorneys to charge flat or advance fees upfront that are wholly nonrefundable regardless of the amount of services rendered. As an alternative, a fee agreement could designate a reasonable part of the initial payment that would be deemed earned by the attorney for opening the case and beginning the representation. If a general retainer for availability is justified and additional charges for actual services are contemplated, the contract could include a statement of the amount of the general retainer and the circumstances supporting it along with a provision setting forth how the fees for actual services will be calculated and collected. Even without such contract provisions, "[i]t is well settled that, where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the client, the attorney may, as a rule, recover on a quantum meruit for the services rendered by him [or her]."

It goes without saying that attorneys whose fee agreements are for flat fees or otherwise similar to those described above should make appropriate changes to those agreements.

Lessons:

1. Non-refundable fees are always refundable for failure to perform the legal services.
2. If entering into a flat fee agreement, it is proper that a reasonable part of the initial payment be deemed earned by the attorney for opening the case and beginning the representation.